(2)

Supreme Court, U.S.
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No. 01-1082

IN THE

Supreme Court of the United States

WINDELL THREADGILL,

Petitioner,

v.

MOORE NORTH AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Although Petitioner admits receiving a right-to-sue notice from the Equal Employment Opportunity Commission ten (10) months prior to filing his Title VII lawsuit, should his delay be excused because his attorney did not receive a copy of the right-to-sue notice?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Windell Threadgill, is a resident of the State of Wisconsin and former employee of Respondent, Moore North America, Inc., f/k/a Moore U.S.A., Inc.

Respondent, Moore North America, Inc., f/k/a Moore U.S.A., Inc., is a wholly owned subsidiary of Moore Corporation Limited, a publicly traded Canadian corporation.

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STATUTE INVOLVED IN THE CASE

The limitations period for commencing an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is set out at 42 U.S.C. § 2000e-5(f)(1) which, in pertinent part, states as follows:

> [I]f within one hundred and eighty days from the filing of such charge . . . , the Commission has not filed a civil action under this section, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so **notify the person aggrieved and within ninety days after the giving of such notice** a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . .

42 U.S.C. § 2000e-5(f)(1) (emphasis added).

STATEMENT OF THE CASE

Respondent, Moore North America, Inc. f/k/a Moore U.S.A., Inc. ("Moore") is a leader in providing information handling products and services to a wide variety of businesses throughout the United States. (District Court Docket, hereinafter "R.," No. 7 at ¶¶ 4-6). Among other products and services, Moore produces and distributes business forms which facilitate the recording, retention, processing, retrieval and communication of business information. *Id.* Between May 23, 1983 and September 22, 1997, the Petitioner was employed by Moore at its Monroe, Wisconsin facility. *Id.*

On January 29, 1998, Petitioner filed a charge with the Wisconsin Department of Workforce Development ("the Department"), as well as the United States Equal Employment Opportunity Commission ("EEOC"), alleging that, in connection with his employment by Moore, he had been harassed, intimidated, denied training and promotional opportunities, and was terminated because of his race in violation of the Wisconsin Fair Employment Law and Title VII of the Civil Rights Act of 1964. (R.7 at ¶¶ 7-8; Ex. A). The Department dismissed the Petitioner's charge on June 14, 1999 because it concluded that there was no evidence to support Petitioner's claim of race discrimination. (R.7 at ¶¶ 9-10; Ex. B). Petitioner appealed the Department's determination but subsequently withdrew his appeal and requested that the EEOC issue a right-to-sue notice to him. (R.7 at ¶¶ 11-12; Ex. C.; R.15 at ¶4).

Pursuant to this request, the EEOC issued a right-to-sue notice to the Petitioner on November 18, 1999. (R.15 at ¶ 5; Ex. 2). Although he received the right-to-sue notice shortly after November 18, 1999, the Petitioner did not commence a lawsuit against Moore within 90 days of receiving the right-to-sue notice. (R.15 at ¶¶6-8). Rather, Petitioner sat on his rights for seven months until June 16, 2000 when he provided the notice to his attorney. *Id.* At that time, his right-to-sue letter was again set aside for nearly an additional three months, until September 6, 2000, when Petitioner's attorney sent a letter to the EEOC requesting the issuance of a second right-to-sue notice. *Id.*; (R.8 at ¶¶ 7-8; Ex. B). On September 11, 2000 the EEOC responded to the Petitioner's attorney and refused to issue a second right-to-sue notice. (R.8 at ¶ 9; Ex. C).

The Petitioner filed his complaint in the United States District Court for the Western District of Wisconsin on September 11, 2000, almost ten months after he received the right-to-sue notice. The complaint purports to set forth claims of unlawful discrimination and retaliation under Title VII, arising out of Petitioner's employment and separation from employment at Moore's Monroe, Wisconsin manufacturing facility. On October 26, 2000, Moore filed a motion to dismiss or, in the alternative, for summary judgment, in relevant part, on the grounds that Petitioner's Title VII claims were time-barred pursuant to 42 U.S.C. § 2000e-5(f)(1), since he failed to commence the action within 90 days of receiving his right-to-sue notice from the EEOC and there was no basis upon which the Petitioner could invoke equitable tolling. On December 11, 2000, the District Court granted Moore's motion for summary judgment as to all of the Petitioner's claims, holding that Petitioner's Title VII claims were time-barred because such claims were not timely filed and equitable tolling of the limitations period was unavailable. (Petition for a Writ of Certiorari, hereinafter "Petition," at Appendix B).

Petitioner filed a Notice of Appeal on January 4, 2001 requesting that the United States Court of Appeals for the Seventh Circuit review the District Court decision granting Moore's motion to dismiss, or in the alternative, motion for summary judgment. The Court of Appeals affirmed the judgment entered by the District Court in favor of Moore. (Petition at Appendix A).

REASONS FOR DENYING THE WRIT

There is no conflict between the Circuit Courts of Appeals nor an important question of federal law that has not but should be settled by this Court. On the contrary, both the District Court and the Court of Appeals correctly applied the statute of limitations under 42 U.S.C. § 2000e-5(f)(1), as well as the federal case law thereunder, in determining that the Petitioner's Title VII claims are time-barred because he failed to file his lawsuit within 90 days after receiving actual notice of his right to sue. Moreover, both courts below properly found equitable tolling of the 90-day limitations period is not permissible since the Petitioner failed to act in a timely fashion and such failure to act was neither the result of a good faith error nor extraordinary circumstances.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS THAT THE 90-DAY LIMITATIONS PERIOD UNDER TITLE VII BEGINS TO RUN ON THE DATE THE EEOC RIGHT-TO-SUE NOTICE IS RECEIVED BY THE CLAIMANT OR THE ATTORNEY REPRESENTING HIM.

42 U.S.C. § 2000e-5(f)(1) requires that a civil action alleging a violation of Title VII must be filed within 90 days of receiving a right-to-sue notice. The limitations period set forth in § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue notice is received by *either* the claimant *or* by the attorney representing him in the Title VII action. *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1312 (7th Cir. 1984); *see also Seitzinger v. Reading Hosp. and Medical* Center, 165 F.3d 236, 239 n.1 (3d Cir. 1999); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 532 n.11 (7th Cir. 1993). Indeed, in *Irwin v. Dep't of Veterans Affairs*, 498 U.S.

89 (1990), Justice White, in his concurring opinion, explicitly noted that the limitations period "begins to run when notice from the Equal Employment Opportunity Commission is delivered either to the claimant or the claimant's attorney . . ." *Irwin*, 498 U.S. at 96.

The 90-day period is strictly applied and even one day's delay beyond 90 days is fatal to the claim unless the delay is excused. *See, e.g., Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985) (plaintiff's Title VII action time-barred where plaintiff filed complaint 94 days after plaintiff's receipt of right-to-sue notice); *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984) (plaintiff's Title VII action time-barred where plaintiff filed complaint 91 days after plaintiff received EEOC right-to-sue notice).

In *Jones*, the claimants, who did not receive right-to-sue letters from the EEOC due to their failure to provide their current addresses, argued that the 90-day period did not commence until they received copies of the right-to-sue letter from their attorney. The Seventh Circuit Court of Appeals rejected the claimants' argument, stating:

> We believe that the most crucial concept in this matter, and a concept that determined many of these decisions . . . is the actual knowledge that the time period in which a suit can be filed has commenced. **Such knowledge is conveyed equally well though personal receipt of the right-to-sue letter by the claimant and through receipt of that letter by the attorney representing him in the action.**

744 F.2d at 1313 (emphasis added).

Here, there is no dispute that the Petitioner personally received a right-to-sue notice shortly after November 18, 1999 and was thereby put on notice of his legal rights at that time. (R.15 at ¶ 5; Ex. 2). Upon receipt of the notice, Petitioner did not commence any lawsuit nor did he attempt to contact his attorney or make a copy of the right-to-sue notice to send to his attorney. (R.15 at ¶¶ 6-8). Rather, he simply "placed the document in [his] papers." (R.15 at ¶ 5). After learning on June 16, 2000 that his client had received the right-sue-notice, the Petitioner's attorney then inexplicably waited until September 6, 2000 to send a letter to the EEOC requesting a second right-to-sue notice. (R.15 at ¶¶ 6-8; R.8 at ¶¶ 7-8; Ex. B). After the EEOC properly rejected this request, the Petitioner filed the complaint on September 11, 2000, nearly ten months after receipt of the right-to-sue notice and well beyond the 90-day limitations period, alleging that the lawsuit was timely commenced within 90 days of the Petitioner receiving actual notice of his right to sue.

On this record, the Seventh Circuit properly held that the 90-day period began to run when the Petitioner personally received the right-to-sue letter at his residence. "If, as in the instant case, the plaintiff actually receives notice from the EEOC, the attorney's receipt is irrelevant; it simply is not required for the 90-day period to begin running." *Threadgill v. Moore U.S.A., Inc.*, 269 F.3d 848, 850 (7th Cir. 2001). This is the same conclusion reached by the Tenth Circuit in *Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985), in which the Court held that the limitations period began to run at the time that the "aggrieved party" personally received the right-to-sue notice. In *Noe*, the fact that the Plaintiff's attorney did not receive the notice until seven days later was irrelevant in determining the date on which the 90-day period commenced.

> In the instant case, the Plaintiff herself received notice more than 90 days before suit was filed. She may not now complain that the 90-days does not begin to run until the receipt of the "right-to-sue" letter by her attorney seven days later.

Noe, 754 F.2d at 892. Moreover, as petitioner acknowledges, the Sixth Circuit long ago rejected the argument he is advancing. *See Ball v. Abbott Advertising, Inc.*, 864 F.2d 419 (6th Cir. 1988)

In the instant case, the Petitioner's claim is untimely because *the Petitioner personally received the notice* at his home more than 90 days prior to commencing his lawsuit. The courts have uniformly held that a plaintiff who files his complaint more than 90 days after personal receipt of the right-to-sue notice is untimely, except in unusual circumstances where principles of equitable tolling apply. *See, e.g., Noe v. Ward*, *supra*; *Aoya*, *supra*; *Million v. Frank*, 47 F.3d 385, 388 (10th Cir. 1995) ("receipt at a plaintiff's address of the right to sue letter constitutes receipt sufficient to start the running of the time period for filing a discrimination action"); *Scholar v. Pacific Bell*, 963 F.2d 264, 267 (9th Cir. 1992) (plaintiff's action, filed 91 days after the right-to-sue letter was received at plaintiff's residence, was time-barred.); *Harvey v. City of New Bern Police Dept.*, 813 F.2d 652 (4th Cir. 1987) (90-day limitations period began running when the right-to-sue letter was received at plaintiff's home); *Espinoza v. Missouri Pacific Railway Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985) ("the giving of notice to the claimant at the address designated by him suffices to start the ninety-day period unless the claimant, through no fault of his own, failed to receive the right-to-sue letter or unless,

for some other equitable reason, the statute should be tolled until he actually receives notice"); *Law v. Hercules, Inc.*, 713 F.2d 691 (11th Cir. 1983) (receipt of the right-to-sue letter at plaintiff's home triggered the limitations period).

The Petitioner argues that the 90-day limitations period should not begin to run until his attorney learned that the Petitioner had received the notice of right-to-sue. Putting aside the Petitioner's failure to plead facts in the complaint sufficient to invoke the District Court's equitable powers to toll a statute of limitations, as the EEOC itself pointed out to the Petitioner, the period of limitations set forth in § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue notice is actually received by either the claimant or by the attorney representing him in the Title VII action. (R.8 at ¶¶ 9-10; Ex. C). Here, the Petitioner admits that he personally received the right-to-sue notice shortly after it was mailed to him on November 18, 1999, (R.15 at ¶5), thus commencing the 90-day limitations period on that date.

The Petitioner's attempt to assert a new legal standard for the commencement of the 90-day period under Title VII is unsupported by any relevant caselaw. As such, it is insufficient to overcome the overwhelming authority holding that Petitioner's actual receipt of the right-to-sue notice in this case commenced the 90-day limitations period.

Plaintiff claims that the decision of the Eleventh Circuit Court of Appeals in *Stallworth v. Wells Fargo Armored Services Corp.*, 936 F.2d 522 (11th Cir. 1991), is at odds with the decisions of other Circuit Courts of Appeals. However, in *Stallworth*, unlike the instant case, "[t]he unrebutted testimony was that [the plaintiff] neither received nor knew about the right-to-sue letter." *Stallworth*, 936 F.2d

at 524. Rather, the right-to-sue letter was received by the plaintiff's nephew, while the plaintiff was not residing at the address, and the nephew never provided the right-to-sue letter to the plaintiff. Moreover, no copy of the right-to-sue letter was provided to the plaintiff's attorney. The facts in *Stallworth* are a far cry from this case, in which it is undisputed that the Petitioner *actually received* the right-to-sue letter more than 90-days prior to commencing his lawsuit.

Indeed, the United States District Court for the Middle District of Alabama, in *Leonard v. Rumsfield*, 146 F. Supp. 2d 1227 (M.D. Ala. 2001), recognized the significance of a plaintiff's personal receipt of the right-to-sue letter and distinguished *Stallworth* from those cases in which the "aggrieved party" actually receives the notice. Accordingly, in *Leonard*, the Court concluded that "the ninety-day statutory period began to run when plaintiff herself received the right-to-sue notice, *notwithstanding the fact that the plaintiff, as in Stallworth, requested that her attorney be provided a copy of the right-to-sue notice but the EEOC did not send a copy to her attorney.*" *Leonard*, 146 F. Supp. 2d at 1236 (emphasis added). Plaintiff's actual receipt of the final agency decision commenced the running of the ninety-day period, despite the EEOC's failure to provide the notice to Plaintiff's attorney. *Leonard*, 146 F. Supp. 2d at 1237.

Simply stated, the 90-day limitations period under Title VII commences when **either** the plaintiff **or** his attorney receives a right-to-sue notice. Here, the 90-day period commenced on the date Petitioner received a notice of right-to-sue and was put on actual notice that he had a period of 90 days to commence litigation under Title VII. Petitioner's attempt to save his otherwise stale claims by fashioning a new legal theory (i.e., that the 90-day period does not begin

to run until a claimant's attorney receives a notice of right-to-sue, even though the claimant has already received such notice) is not supported by the statute or the relevant caselaw. The District Court correctly determined that the Petitioner's Title VII claims are time-barred and the Seventh Circuit properly affirmed that decision.

II. NOTHING IN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS NOR IS EQUITABLE TOLLING OF THE 90-DAY LIMITATION PERIOD APPROPRIATE IN THIS CASE.

Petitioner's reliance on *Irwin*, in which this Court held that the 30-day period applicable to Title VII claims against the federal government began to run when the notice from the EEOC was delivered to the claimant's attorney, is misplaced. In *Irwin*, the claimant's attorney received a copy of the right-to-sue letter on March 23, 1987, but did not learn of the letter until April 10, 1987 because he was out of the country at the time of delivery. *Id.* at 91. The plaintiff received the right-to-sue notice on April 7, 1987. *Id.* The Title VII lawsuit was commenced on May 6, 1987, 44 days after the EEOC notice was received by the attorney's office, but 29 days after plaintiff allegedly received the notice. *Id.* The plaintiff argued that his action was timely commenced since he did not personally receive the notice until April 7, 1987. This Court held that the 30-day period began running when the plaintiff's attorney first received the notice at his office, on March 23, 1987, and the plaintiff's action was therefore untimely. *Id.* at 92. In so holding, this Court stated, "§2000e-16(c) requires only that the EEOC notification letter be 'received'; it does not specify receipt by the claimant rather

than by the claimant's designated representative." *Id.* In the instant matter, the Petitioner personally received the right-to-sue letter, which commenced the running of the limitations period.[1]

There is simply no support for the Petitioner's position that the limitations period did not begin to run at the time that the right-to-sue notice was actually received by the Petitioner. As noted above, the courts have uniformly held that personal receipt of the right-to-sue notice by the charging party triggers the limitations period under Title VII. Perhaps in acknowledgement of the difficulty involved in convincing a court to apply equitable tolling, the Petitioner attempts to shift blame to the EEOC, suggesting that it is somehow responsible for the Petitioner's failure to timely file this lawsuit. However, nothing in the EEOC's regulations regarding issuance of a right-to-sue notice, 29 C.F.R. § 1601.28; the EEOC compliance manual; or any other authority cited by Petitioner, including Rule 5(b) of the Federal Rules of Civil Procedure, suggests that the actual receipt of the right-to-sue notice by the Petitioner should be rendered a nullity simply because a copy of the notice was not provided to the Petitioner's attorney.[2]

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1. Indeed, the Petitioner's argument ignores the fact that his request for a right-to-sue notice explicitly asked that the notice be sent to Petitioner, with only a copy going to his attorney's office. (R.15 at Ex. 1).

2. Petitioner's attempt to tether his argument to Rule 5(b) ignores the fact that the right-to-sue notice involved in this matter is a condition precedent to the commencement of formal litigation to which the Federal Rules apply. *See* Rule 1, Federal Rules of Civil Procedure; *see also* Vol. 1 Moore's Federal Practice, § 1.20 (Matthew Bender 3d ed.).

Petitioner's suggestion that equitable tolling is appropriate in the instant case is also misplaced. In this regard, principles of equitable tolling should not be applied to what is, at best, a garden variety claim of neglect and "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin*, 498 U.S. at 96. In fact, the remedy of equitable tolling is reserved for situations in which the claimant has made a good faith error (e.g., brought suit in the wrong court) or has been prevented in some extraordinary way from filing his complaint in time. *See, e.g., Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996); *Jones*, 744 F.2d at 1314. Here, the Petitioner blithely stated in his complaint that actual notice of the right to sue occurred less than ninety (90) days prior to filing. The Petitioner's complaint is silent regarding the delays in filing his lawsuit and provides no support for a claim that the Petitioner be granted a tolling period within which to file his otherwise stale claims. Simply put, there is nothing whatsoever contained in the complaint or the record before the Court that could warrant equitable tolling.

As this Court admonished almost two decades ago, in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County*, 466 U.S. at 151. Clearly, in the instant matter, the Petitioner cannot invoke the doctrine of equitable tolling to excuse his neglect in setting aside the right-to-sue notice he received from the EEOC for a period of approximately seven months before notifying his attorney that he had received it. The Petitioner personally received an EEOC right-to-sue notice shortly after it was issued on November 18, 2000, and failed to file the complaint until September 11, 2000, nearly ten months after receiving notice of his rights. The Petitioner's inaction gives rise to the type of "garden variety claim of excusable neglect" to which equitable tolling is inapplicable.

Given his admitted laches, the Petitioner has not argued (nor can he argue) that the 90-day limitations period should be tolled because he did not receive the right-to-sue letter due to circumstances beyond his control. The Petitioner admits that, upon receiving the right-to-sue letter, he did not read the right-to-sue letter, contact his attorney regarding its contents, or send a copy of the right-to-sue letter to his attorney. (R.15 at ¶5). Instead, the Petitioner "simply placed the document in [his] papers." *Id.* Clearly, the Petitioner cannot maintain that his disregard of the right-to-sue notice constitutes an "extraordinary circumstance" to which equitable tolling should be applied. *See, e.g., Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995) ("the doctrine of equitable tolling cannot be applied simply because the Petitioner chose to examine his mail on a weekly basis rather than as it arrived"). The Petitioner's inattentiveness is simply not a sufficient basis for tolling the 90-day limitations period.

Neither smoke nor mirrors can assist the Petitioner in escaping the undisputed fact that he received the notice and disregarded it for a period of approximately seven months prior to informing his attorney and then sat on it for almost three additional months before filing the complaint in this case. The Petitioner's failure to exercise diligence in preserving his legal rights is exactly the type of conduct toward which this Court has "generally been much less forgiving." *Irwin*, 498 U.S. at 96. Since the Petitioner's claims are fatally flawed in that they were not timely filed pursuant to 42 U.S.C. § 2000e-5(f)(1) and he is not entitled to equitable tolling of the limitation period, the Petitioner's claims were properly dismissed.

CONCLUSION

For all the reasons noted above, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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